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LOVE V. SUPERIOR COURT: MANDATORY AIDS TESTING AND PROSTITUTION

KARIN ZINK*

The AIDS¹ epidemic has brought one of our most fundamental constitutional rights into sharp focus in California. The relationship between the Fourth Amendment right to be free from unreasonable searches and seizures and the government's ability to mandate AIDS testing was the topic of a recent California case, *Love v. Superior Court*.² In a unanimous decision the California Court of Appeal upheld section 1202.6 of the California Penal Code³ [hereinafter § 1202.6] mandating AIDS testing of persons convicted of soliciting an act of prostitution.⁴ The court held that the California law does not violate the Fourth Amendment's prohibition against unreasonable search and seizures despite the absence of a warrant, probable cause, or even individualized suspicion.⁵

This case was decided against a background of recent United States Supreme Court decisions upholding warrantless government searches under the developing doctrine of "special needs." In limited circumstances, this doctrine provides an exception to the Fourth Amendment's warrant and probable cause requirements.⁶

This note will review the development of the "special needs" doctrine, analyze the *Love* court's application of the "special

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1. AIDS is an acronym for Acquired Immune Deficiency Syndrome. AIDS is evidenced by the presence of antibodies to the Human Immunodeficiency Virus (HIV) in a person's blood. *Blacks Medical Dictionary* 18 (35th ed. 1987). The terms "AIDS testing" and "HIV testing" will be used interchangeably in this note.

2. 226 Cal. App. 3d 736, 276 Cal. Rptr. 660 (1990), *review denied* Mar. 14, 1991.

3. CAL. PENAL CODE § 1202.6 (West Supp. 1992).

4. *Love*, 226 Cal. App. 3d at 746.

5. *Id.* at 743.

6. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (warrantless drug and alcohol testing of railroad employees following major train accidents is constitutional under the "special needs" doctrine); *Treasury Employees' v. Von Raab*, 489 U.S. 656 (1989) (warrantless drug testing of Customs employees upheld under the "special needs" doctrine); *New York v. Burger*, 482 U.S. 691 (1987) (warrantless inspection of the premises of a highly regulated business upheld under the "special needs" doctrine).

needs" test and demonstrate how the shortcomings of the court's application and analysis endangers our privacy rights under the Fourth Amendment.

I. HISTORY OF THE LOVE CASE:

A. LEGISLATIVE HISTORY:

In 1988, the California Legislature adopted § 1202.6.⁷ This law orders AIDS testing⁸ and AIDS education⁹ for persons convicted of soliciting an act of prostitution in violation of

7. CAL. PENAL CODE § 1202.6 (West Supp. 1992) (codifying S.B. 1007 and enacting CAL. PENAL CODE §§ 647(f), 1202.1, 1202.6 and 12022.85). The third and final revision of S.B. 1007 requires that persons convicted of prostitution and various sex offenses submit to AIDS tests. The bill further provides for penalty enhancement for subsequent convictions of prostitution and sexual offenses and AIDS education for convicted prostitutes. S.B. 1007, 1987-88 Cal. Leg. Reg. Sess., (as amended June 20, 1988). The original version of the bill, as introduced, required only testing and penalty enhancement for prostitutes. S.B. 1007, 1987-88 Cal. Leg. Reg. Sess., (as amended March 4, 1988). The second version added testing of sex offenders and the third and final version added AIDS education for prostitutes and penalty enhancement for sex offenders. S.B. 1007, 1987-88 Cal. Leg. Reg. Sess., (as amended May 4, and June 20, 1988).

8. CAL. PENAL CODE §1202.6:

(a) Notwithstanding Section 199.20, 199.21, and 199.22 of the Health and Safety Code, upon the first conviction of any person for a violation of subdivision (b) of Section 647, the court shall, before sentencing or as a condition of probation, order the defendant . . . to submit to testing for AIDS in accordance with subdivision (e).

(b) Upon a second or subsequent conviction of a violation of subdivision (b) of Section 647, the court shall, before sentencing, order the defendant to submit to testing for AIDS in accordance with subdivision (e).

* * *

(e) The court shall order testing of every defendant as ordered pursuant to subdivision (a) or (b) for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome.

Id.

9. CAL. PENAL CODE § 1202.6(d):

An AIDS prevention education program providing services, at a minimum, shall include details about the transmission of human immunodeficiency virus (HIV), the etiologic agents for AIDS, symptoms of the AIDS or AIDS-related conditions, prevention through avoidance or cleaning of needles, sexual practices which constitute high risk, low risk, and no risk (including abstinence), and resources for assistance if the person decides to take the test for the etiologic agent for AIDS and receives a positive test. The program also shall include other relevant and preventative information as it becomes available.

Id.

section 647(b) of the California Penal Code¹⁰ [hereinafter § 647(b)]. The statute directs the court to advise those defendants who test positive that a subsequent conviction under § 647(b) will be elevated from a misdemeanor to a felony.¹¹ In addition the statute requires that the test results be submitted to the defendant,¹² the court,¹³ and the State Department of Health Services.¹⁴ Confidentiality of the test results is required by the statute¹⁵ “except that the department [of Health Services] shall furnish copies of any such report to a district attorney upon request.”¹⁶ The law does not, how-

10. CAL. PENAL CODE § 647(b) (West Supp. 1992). This subsection requires in pertinent part: “Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . [¶] (b) Who solicits, or who agrees to engage or who engages in any act of prostitution. . . . As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.” *Id.*

11. CAL. PENAL CODE § 1202.6(c):

If the results of the tests described in the report are positive, the court shall make certain that the defendant understands the nature and meaning of the contents of the report and shall further advise the defendant of the penalty established in Section 647(f) for a subsequent violation of subdivision (b) of Section 647.

Id. CAL. PENAL CODE 647(f):

In any accusatory pleading charging a violation of subdivision (b) of Section 647, if the defendant has been previously convicted one or more times of a violation of that subdivision . . . and in connection with one or more of those convictions a blood test was administered . . . with positive test results, of which the defendant was informed, the previous conviction and the positive test results . . . shall be charged in the accusatory pleading. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony.

Id.

12. CAL. PENAL CODE § 1202.6(c): “At the sentencing hearing of a defendant ordered to submit to testing for AIDS pursuant to subdivision (a) or (b), the court shall furnish the defendant with a copy of the report submitted pursuant to subdivision (e) and shall direct the clerk to note the receipt of the report by the defendant in the record of the case.” *Id.*

13. CAL. PENAL CODE §1202.6(e): “Notwithstanding Section 199.21 of the Health and Safety Code, written copies of the report on the test shall be furnished to both of the following: [¶] (1) The court in which the defendant is to be sentenced. [¶] (2) The State Department of Health Services.” *Id.*

14. *Id.*

15. CAL. PENAL CODE § 1202.6(f): “Except as provided in subdivisions (c) and (g), the reports shall be confidential.” *Id.*

16. CAL. PENAL CODE §1202.6(g): “The State Department of Health Services shall maintain the confidentiality of the reports received pursuant to subdivision (e), except that the department shall furnish copies of any such report to a district attorney upon request.” *Id.*

ever, impose on the district attorney any requirement of confidentiality.¹⁷

B. PROCEDURAL HISTORY:

The Petitioners were convicted in San Francisco Municipal Court of soliciting an act of prostitution in violation of § 647(b).¹⁸ Upon conviction, the Petitioners were ordered to submit to AIDS testing pursuant to § 1202.6.¹⁹ In an attempt to challenge the constitutionality of the testing requirement, a petition for a writ of mandate was filed in Superior Court on behalf of Petitioners and all others similarly situated.²⁰ Upon denial of the writ by the Superior Court, a petition was subsequently filed in the appellate court.²¹

The Petitioners' principal contention was that § 1202.6 violated their rights under the Fourth Amendment to be free from unreasonable searches and seizures.²² The basis for the objection was that the mandatory testing scheme violated the Fourth Amendment because it authorizes a bodily intrusion for the removal of blood and its subsequent chemical testing in the absence of a warrant and probable cause.²³

II. BACKGROUND

A. UNITED STATES SUPREME COURT INTERPRETATIONS OF THE FOURTH AMENDMENT:

The Fourth Amendment of the United States Constitution provides that the people have a right to be free from

17. CAL. PENAL CODE § 1202.6. Subsection (f) requires that the results disclosed pursuant to subdivision (e), (disclosed to the court and the State Department of Health Services), shall be confidential. Subdivisions (c) and (g) permit the disclosure in certain limited circumstances, (subsection (c) allows the court to disclose the results to the defendant and subsection (g) allows for the State Department of Health Services to disclose the test results to district attorney upon request.) However, Subdivision (f) does not require the district attorney to maintain the confidentiality of the test result. *Id.*

18. *Love v. Superior Court*, 226 Cal. App. 3d 736, 739 (1990).

19. *Id.*

20. *Id.* at 739-40.

21. *Id.* at 740.

22. *Love*, 226 Cal. App. at 740. The Petitioners also argued that § 1202.6 violates the due process and equal protection clauses of the U.S. Constitution. *Id.* at 747. Finding little merit to these arguments, the court focused its analysis of § 1202.6 under the Fourth Amendment. See *infra* notes 112-113 (brief discussion of the courts analysis of Petitioners' other arguments.)

23. *Id.*

unreasonable searches and seizures.²⁴ The Supreme Court has noted that “the basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.”²⁵ In analyzing Fourth Amendment violations, court must make the initial determination of whether a governmental search or seizure has occurred.²⁶ The Supreme Court has defined a search as a government action which intrudes on an individual’s reasonable expectation of privacy.²⁷ Because the Fourth Amendment does not proscribe all searches, but only those that are unreasonable, a court must then determine whether the search is reasonable.²⁸ The reasonableness of a search is dependant, in part, on

24. U.S CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to searched, and the persons or things to be searched.

Id.

25. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The Supreme Court reversed the defendants conviction for failure to allow a warrantless search of his home for housing code violations. *Id.* at 523. The Court held that area housing inspections were reasonable only if conducted pursuant to a warrant. *Id.* at 532. However, rather than imposing the usual probable-cause requirement, the Court held that probable-cause existed if there were reasonable legislative or administrative standards governing the inspection. *Id.* at 538.

26. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 614 (1989). The court upheld FRA [Federal Railroad Administration] regulations mandating warrantless substance abuse testing of certain railroad employees following major railroad accidents. *Id.* at 634. Analyzing the threshold question of whether a governmental search or seizure has occurred, the Court stated that a compelled physical intrusion into the body for blood “must be deemed a Fourth Amendment search” and that the chemical analysis of the sample is a further privacy invasion. *Id.* at 616.

27. *Katz v. United States*, 389 U.S. 347, 360 (1967). The Court held that evidence of a telephone conversation obtained by use of an electronic device without a warrant was inadmissible. *Id.* at 359. The court found that a search had occurred because the defendant had an expectation that his conversations on a public telephone would be private and society recognized that expectation of privacy. *Id.* at 353; *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985). The Court held that the warrantless search by school officials of a student’s property did not violate the Fourth Amendment. In finding that students have a reasonable expectation of privacy, the Court stated that “to receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is ‘prepared to recognize as legitimate’” *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

28. *Schmerber v. California*, 384 U.S. 757, 768 (1966). The Court determined that a warrantless blood alcohol test was a reasonable search under the Fourth Amendment because: (1) the police had probable cause to arrest the defendant while driving under the influence; (2) the search was conducted incident to a valid arrest; and (3) the delay involved in obtaining a warrant would result in a loss of evidence. *Id.* at 772. The Court investigated the reasonableness under the circumstances of the warrantless search noting that the Fourth Amendment prohibits only those searches that are unreasonable. *Id.* at 768.

the type of search the government is conducting.²⁹ There are two categories of governmental searches as defined by the Supreme Court: criminal searches and administrative searches.³⁰

A criminal search involves a governmental intrusion with the intent to procure evidence to be used in a criminal proceeding.³¹ With few exceptions, a criminal search is reasonable only if executed pursuant to a warrant issued by a neutral magistrate.³² For a search warrant to be issued there must be probable cause to believe that evidence of a crime will be discovered.³³

An administrative search involves a governmental intrusion with the intent to obtain information to be used to ensure compliance with regulations or to protect public health and safety.³⁴ Because administrative searches address problems unlike those addressed in normal law enforcement activities, the Supreme Court has recognized that administrative searches generally cannot be dealt with adequately using the Fourth

29. See *Skinner*, 489 U.S. at 619 (reasonableness depends on all the circumstances surrounding the search and the nature of the search itself); *T.L.O.*, 469 U.S. at 337 (reasonableness of a search is dependant on the context in which the search takes place).

30. Note, *AIDS, Rape and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1618 (1990).

31. See *Katz*, 389 U.S. at 355 (telephone wiretapping during police investigation constituted a criminal search because it was conducted to obtain evidence that Katz was involved in illegal activities); *Schmerber*, 384 U.S. at 757 (a blood alcohol test involved a criminal search because it was used to discover evidence of intoxication for a drunk driving arrest).

32. *Schmerber*, 384 U.S. at 770. The Court stated that the Fourth Amendment requires that a neutral and detached magistrate determines whether the evidence supports the issuance of a search warrant. *Id.*

33. *Id.* See also U. S. CONST. amend. IV: ("no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched"); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause is a practical, common-sense decision by a magistrate that, given all the circumstances, there is a fair probability that evidence of a crime will be found in a particular place).

34. See *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602 (1989) (blood alcohol testing conducted pursuant to FRA [Federal Railroad Administration] regulations are administrative searches because they are conducted to ensure railroad safety by detecting substance abuse in railroad employees); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (search of a doctor's office by state hospital officials constituted an administrative search because it was conducted to ensure the efficient operation of the work place); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of a student's property by school officials constituted an administrative search because it was conducted to maintain discipline in the school rather than to obtain evidence of criminal activity); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (housing inspection by an inspector of the Department of Public Health constituted an administrative search because it was conducted to ensure compliance with the housing code by investigating code violations).

Amendment's warrant and probable cause restrictions.³⁵ As a result, the Court has decided that administrative searches must be judged by a different standard.³⁶

The standard for administrative searches was first articulated by the Supreme Court in *Camara v. Municipal Court*.³⁷ In holding that area housing inspections could be conducted pursuant to a warrant issued on less than the usual quantum of probable cause, the court stated that reasonableness was still the ultimate standard but that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."³⁸

The Court noted that "[w]here considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."³⁹ The Court found that "probable cause to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting the area inspection are satisfied."⁴⁰

35. *Camara*, 387 U.S. at 533:

In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Id.

36. *Id.* at 534.

37. 387 U.S. 523 (1967).

38. *Id.* at 536-37.

39. *Camara*, 387 U.S. at 538, (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).

40. *Camara*, 387 U.S. at 538:

Such standards, which will vary with the municipal program being enforced, may be based on the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Id. See also CAL. CIV. PROC. CODE § 1822.52 (West 1990): "Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place . . . , or there is reason to believe that a condition of nonconformity exists with respect to the particular place . . ." *Id.*

In its application of this balancing theory, the Court focused on three factors in determining the reasonableness of the governmental inspection: (1) the history of judicial and public acceptance; (2) the strong public interest in combatting the problem; and (3) the relatively limited privacy invasion.⁴¹

The *Camara*⁴² balancing test has been applied in numerous contexts in California, including agricultural inspections,⁴³ inspection of business records for licensing,⁴⁴ and regional water control.⁴⁵ Since *Camara*,⁴⁶ however, the Court has expanded the scope of administrative searches to allow warrantless searches under the developing doctrine of "special needs".⁴⁷ A "special needs" situation exists when the individual's privacy interests are weakened, and the governmental interests are concomitantly heightened causing the balance to

41. *Camara*, 387 U.S. at 536-37:

[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But . . . a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

Id. (citation omitted).

42. 387 U.S. 523.

43. *See, e.g., Vidaurri v. Superior Court*, 13 Cal. App. 2d 550, 91 Cal. Rptr. 704 (1970) (inspections by the county agricultural commissioner require the issuance of an inspection warrant as provided in Section 1822.50 of the CIVIL PROCEDURE CODE).

44. *See, e.g., Pinney v. Phillips*, 230 Cal. App. 3d 1570, 281 Cal. Rptr. 904 (1991) (inspections of the business records of an electrical contractor requires an inspection warrant under CAL. CIV. PROC. CODE § 1822.50 because the business was not closely regulated).

45. *See, e.g., Joseph v. Masonite Corp.*, 148 Cal. App. 3d 6, 195 Cal. Rptr. 629 (1983) (issuance of an inspection warrant to enter timberland and observe logging operations in order to determine whether there was compliance with water quality control provisions held constitutional).

46. 387 U.S. 523.

47. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). "Only in those exceptional circumstances in which special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* *See also Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Treasury Employees' v. Von Raab*, 489 U.S. 656, 665 (1989); *O'Connor v. Ortega*, 480 U.S. 709 (1987).

be struck in favor of the governmental search.⁴⁸ When faced with a “special need”, courts have “not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements *in a particular context*.”⁴⁹ The “special needs” doctrine has been employed to uphold searches in numerous contexts involving special circumstances, including searches of school children,⁵⁰ border searches,⁵¹ and searches of the desks and offices of public employees.⁵²

While the “special needs” doctrine has developed in an ad hoc fashion, the Supreme Court helped to clarify the doctrine in *Burger v. New York*.⁵³ The Court found the “special needs” doctrine applicable to the warrantless search of an automobile junk yard, stating that the privacy interests of the defendant were reduced due to his participation in a closely regulated industry⁵⁴ and the government interests were heightened because of the increased problem of vehicle theft.⁵⁵ While the Court struck the balance in favor of the government, it declared

48. *New York v. Burger*, 482 U.S. 691, 698 (1987). “Because the owner . . . has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a governmental search, have a lessened application in this context.” *Id.* (citations omitted). “[A]s in other situations of “special need” where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.” *Id.* at 698-99 (citations omitted).

49. *Skinner*, 489 U.S. at 619 (emphasis added). *See, e.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (the warrantless search of a probationer’s home constitutional under “special needs”); *Burger*, 482 U.S. at 699-703 (the warrantless search of the premises of a highly regulated business was held to be constitutional under “special needs”); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (the warrantless body cavity search of a prison inmate was upheld under the “special needs” doctrine).

50. *T.L.O.*, 469 U.S. at 325. In this case the Supreme Court held that the warrantless search of a student’s purse by school officials was constitutional. *Id.* at 347-48. The Court found that the need for swift and informal disciplinary procedures outweighed the intrusion to the students expectation of privacy. *Id.* at 341.

51. *United States v. Martinez-Fuentes*, 428 U.S. 543 (1976). The Court was faced with the constitutionality of routine vehicle stops at permanent checkpoints near the Mexican border. *Id.* The Court found that the need to safeguard our border along with the impracticability of obtaining a warrant justified the warrantless search. *Id.*

52. *O’Connor v. Ortega*, 480 U.S. 709 (1987). In *Ortega*, the Court held that the warrantless search of a state employee’s office was constitutional. *Id.* In balance the Court found that the employee’s reasonable expectation of privacy was outweighed by the government’s need for supervision, and efficient operation of the work place. *Id.* at 725.

53. 482 U.S. 691 (1987).

54. *Id.* at 698. “[T]he owner or operator of commercial premises in a closely regulated industry has a reduced expectation of privacy.” *Id.*

55. *Id.* at 702. “In this day, automobile theft has become a significant social problem, placing enormous economic and personal burdens upon the citizens of different states.” *Id.*

that a warrantless search may be reasonable only upon meeting three criteria:⁵⁶ (1) a substantial governmental interest which justifies the regulatory scheme under which the search is conducted;⁵⁷ (2) a warrantless inspection must be necessary to further the regulatory scheme;⁵⁸ and (3) the regulatory scheme must serve as a constitutionally adequate substitute for a search warrant.⁵⁹

Having decided that the junkyard search met these criteria, the Court went on to explain that although the purpose of the statute was to deter criminal activity and the inspections were conducted by police officers, the "special needs" exception was still applicable because the primary purpose was not to obtain evidence for use in a criminal proceeding.⁶⁰

56. *Id.* at 699. "This warrantless inspection . . . will be deemed to be reasonable only so long as three criteria are met." *Id.*

57. *Id.* "[T]here must be a 'substantial' governmental interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* The Court found that the state had a substantial interest in regulating the vehicle-junkyard industry "because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry." *Id.* at 710-12. *See also* *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (the government has a substantial interest in improving the health and safety of underground and surface mines); *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (the state has a substantial interest in maintaining school security and providing an environment in which learning can take place).

58. *Burger*, 482 U.S. at 699. "[W]arrantless inspections must be 'necessary to further [the] regulatory scheme.'" *Id.* (quoting *Donovan v. Dewey*, 452 U.S. at 600). The Court found that a warrant requirement would frustrate the statute's purpose of deterring automobile theft "[b]ecause stolen cars and parts often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them." *Id.* at 703. *See also* *Donovan*, 452 U.S. at 600 (the warrantless mine inspections were necessary because forcing inspectors to obtain a warrant before each inspection would frustrate the purpose of the inspection by possibly alerting owners and operator of the mines of impending inspections); *T.L.O.*, 469 U.S. at 340 (requiring school officials to obtain a warrant before searching a student would interfere with the swift and informal disciplinary procedure need in schools and thus frustrate the government purpose behind the search); *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (requiring a warrant before searching probationers would interfere with the probation system by substituting a magistrate for a probation officer as the judge of how extensively a probationer requires supervision and by causing a delay in the probation officers response to evidence of misconduct by the probationer).

59. *Burger*, 482 U.S. at 699 "[T]he statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant" *Id.* (quoting *Donovan*, 452 U.S. at 603). The Court held that "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officer." *Id.* at 699. The Court held that this requirement was met, stating the "[t]he statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis, . . . the 'time, place and scope' of the inspection is limited," and appropriate restraints are placed upon the discretion of the inspecting officers. *Id.* at 703.

60. *Burger*, 482 U.S. at 704. "[A] State can address a major social problem both by way of an administrative scheme and through penal sanctions. Administrative

It was not until 1989 that the Supreme Court extended the scope of the “special needs” doctrine to allow warrantless intrusions of an individual’s body.⁶¹ In two companion cases, *Skinner v. Railway Executives’ Ass’n* and *Treasury Employees’ v. Von Raab*, the Court employed the “special needs” exception to uphold searches of an individual’s body and bodily fluids.⁶²

In *Skinner*,⁶³ the Court upheld drug and alcohol testing of railroad employees following major train accidents.⁶⁴ Applying the “special needs” doctrine, the Court held that the privacy interests of the employees were reduced due to the regulation of the industry by the government⁶⁵ and the government interest was heightened due to the need to regulate the conduct of railroad employees to ensure the safety of the railroads.⁶⁶

Applying the three prong test laid out in *Burger*,⁶⁷ the Court first found that the government had a substantial interest in ensuring the overall safety of the railroads by regulating the conduct of railroad employees who engaged in safety sensitive tasks.⁶⁸ Second, the Court found that the warrantless

statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem.” *Id.* (emphasis in original). “So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations . . .” *Id.* at 707. See also *United States v. Biswell*, 406 U.S. 311, 313 (1972) (the warrantless inspection of a pawnshop licensed to sell firearms was constitutional despite the fact that the information obtained during the inspection was used to prosecute the pawnshop owner because the inspection was a valid administrative search. *But see* *Salwasser Mfg. Co., Inc. v. Municipal Court*, 94 Cal. App. 3d 223, 231, 156 Cal. Rptr. 292 (1979) (inspections made pursuant to Cal/OSHA (California Occupational Safety and Health Act) subject to the Fourth Amendment’s probable cause requirement because of the possible penal consequences of Cal/OSHA).

61. *Skinner*, 489 U.S. 602.

62. *Id.*; *Von Raab*, 489 U.S. 656.

63. 489 U.S. 602.

64. *Skinner*, 489 U.S. at 606. The Federal Railroad Administration (FRA) promulgated regulations that mandate blood and urine tests of railroad employees who are involved in certain railroad accidents. *Id.*

65. *Id.* at 627. “The expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependant, in substantial part, on the health and fitness of covered employees.” *Id.*

66. *Skinner*, 489 U.S. at 628. The Court found that the government has a compelling interest in the testing of railroad employees. Stating that “[e]mployees subject to the tests discharge duties fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous consequences.” *Id.*

67. 482 U.S. 691.

68. *Id.* at 628.

inspections were necessary to further the regulatory scheme.⁶⁹ Due to the rate that drugs and alcohol are depleted from the bloodstream, the Court found that the delay in obtaining a warrant would frustrate the governmental interest.⁷⁰ In addition, the warrant requirement would detract from the deterrent effect of the regulation, which is dependant on an effective testing program.⁷¹ Third, the Court found that the testing program served as an adequate substitute for a warrant because it narrowly defined the scope of the search, applied the testing program with regularity, and gave the inspecting officers only limited discretion.⁷²

In *Von Raab*,⁷³ the Court followed a similar analysis in upholding drug testing of customs officials who participated in drug interdiction or carried firearms.⁷⁴ In its application of the "special needs" doctrine, the Court held that, because the customs officials in question were involved in tasks which greatly impacted on public safety and welfare, they had a diminished

69. *Id.* at 624. The Court found that "imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objective of the Government's testing program." *Id.*

70. *Id.* at 623. The Court noted that since "alcohol and other drugs are eliminated from the bloodstream at a constant rate, . . . blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and therefore "the delay necessary to procure a warrant . . . may result in the destruction of valuable evidence." *Id.* See also *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

71. *Skinner*, 489 U.S. at 629-30:

[C]ustomary dismissal sanctions that threatens the employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs of alcohol while subject to being called to duty.

Id. (citations omitted).

72. *Id.* at 622. The Court found that "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees." *Id.*

73. 489 U.S. 656. The United States Customs Service promulgated a drug screening program requiring urinalysis testing of employees seeking transfer or promotion to positions having direct involvement in drug interdiction or the requirement of carrying firearms. *Id.* at 660-61.

74. *Id.* at 679. The Court held that warrantless drug testing of certain customs officials was constitutional, finding that the privacy interest of covered employees was outweighed by the government's interest in protecting the integrity of our borders. *Id.*

expectation of privacy⁷⁵ while the government had a heightened interest in safeguarding the borders.⁷⁶

Concluding that the testing program bore a close and substantial relation to the governmental goal,⁷⁷ the Court struck the balance in favor of the government inspection.⁷⁸ Applying the *Burger*⁷⁹ three prong test, the Court concluded first that the government had a substantial interest,⁸⁰ and second, that requiring a warrant would only divert agency resources⁸¹ while providing little additional protection to the employee.⁸² Third, as it found in *Skinner*,⁸³ the Court decided that the test-

75. *Id.* at 672:

Customs employees who are directly involved in the interdiction of drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to intrusions occasioned by the urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.

Id.

76. *Id.* at 670. "It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have impeachable integrity and judgment." *Id.*

77. *Id.* at 676. The Court found that "the program bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions." *Id.*

78. *Id.* at 677. The Court held that the government's "compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm." *Id.*

79. 482 U.S. 691.

80. *Id.* at 666. The Court held that the Customs Service has a compelling interest in preventing the promotion of employees who use drugs to positions "where they might endanger the integrity of our Nation's borders or the lives of the citizenry." *Id.*

81. *Id.* at 666-67:

Even if Customs Service employees are more likely to be familiar with the procedures required to obtain a warrant than most other Government workers, requiring a warrant in this context would serve only to divert valuable agency resources from the Service's primary mission. The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.

Id.

82. *Id.* at 667. The Court found that a warrant would provide little or no additional protection of the employee's privacy interests.

83. 489 U.S. 602.

ing program served as an adequate substitute for a search warrant.⁸⁴

B. CALIFORNIA LEGISLATIVE ACTION:

The state has the power and the duty to protect its citizenry from the spread of communicable diseases.⁸⁵ To accomplish this, the state may take the steps necessary to prevent the spread of any contagious disease including quarantines,⁸⁶ inspections,⁸⁷ and disinfection.⁸⁸

Since 1985, California law has distinguished AIDS from other communicable diseases by prohibiting AIDS testing without written consent.⁸⁹ The California Legislature not only increased the privacy rights of the citizens by prohibiting compulsory AIDS testing, the Legislature provided for both civil and criminal sanctions for unauthorized disclosure of test results to further ensure the protection of these rights.⁹⁰

84. *Von Raab*, 489 U.S. at 667. The Court found that testing program was defined narrowly and specifically and that covered employees are doubtlessly aware of the testing program and that they are not subject to the discretion of the officer conducting the tests. *Id.*

85. CAL. HEALTH AND SAFETY CODE § 3051 (West 1990): "The state department may quarantine, isolate, inspect and disinfect persons, animals, houses, rooms, other property, places cities or localities, whenever in its judgment such action is necessary to protect or preserve the public health." *Id.*; CAL. HEALTH AND SAFETY CODE § 3110 (West 1990): "Every health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the State Department of Health Services, or any other contagious, infectious or communicable disease exists, or has recently existed, . . . shall take such measures as may be necessary to prevent the spread of the disease or the occurrence of additional cases." *Id.*

86. *See, e.g.*, In re Johnson, 40 Cal. App. 242, 180 P. 644 (1919) (quarantine of persons afflicted with and suffering from gonococcus infection, (including: leprosy, smallpox, and typhus fever) held to be a valid exercise of the state's power to protect public health).

87. *See, e.g.*, In re Clement, 61 Cal. App. 666, 215 P. 698 (1923) (police detention of a proprietor of a house of prostitution and the testing of her blood for venereal disease held to be a valid exercise of the state's police power).

88. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (Supreme Court held that it is within the police power of the state to enact a compulsory smallpox vaccination law to protect the public health).

89. CAL. HEALTH AND SAFETY CODE § 199.22 (West Supp. 1992). This section provides that "no person shall test, a persons blood for evidence of antibodies to the probable causative agents of AIDS without the written consent of the subject of the test." *Id.*

90. CAL. HEALTH & SAFETY CODE § 199.21 (West Supp. 1992):

(a) Any person who negligently discloses results of an HIV test . . . to any third party . . . except pursuant to a written authorization . . . or any other statute that expressly provides an exemption to this section, shall be assessed a civil penalty in the amount not more than one thousand dollars (\$1,000) plus court costs, . . . which penalty and costs shall be paid to the subject of the test.

However, in 1988 the California Legislature passed several bills excluding certain groups from these privacy protections. These bills established exceptions to the 1985 AIDS consent requirements for testing and disclosure by authorizing compulsory AIDS testing of certain criminal defendants,⁹¹ prison inmates,⁹² and prostitutes⁹³.

III. THE COURT'S ANALYSIS:

The court of appeal in *Love* began its analysis with the threshold question of whether the blood tests mandated by § 1202.6 of the California Penal Code constituted a search under the Fourth Amendment.⁹⁴ In its determination that the blood

(b) Any person who willfully discloses the results of an HIV test . . . to any third party . . . except pursuant to a written authorization . . . or any other statute that expressly provides an exception to this section, shall be assessed a civil penalty in the amount not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000) plus court costs . . . which penalty and costs shall be paid to the subject of the test.

(c) Any person who willfully or negligently discloses results of an HIV test . . . to any third party . . . except pursuant to a written authorization . . . or any other statute that expressly provides an exemption to this section, which results in economic, bodily or psychological harm to the subject of the test, is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period not to exceed one year or a fine not to exceed ten thousand dollars (\$10,000) or both.

(d) Any person who commits any of the act described in subdivision (a) or (b) shall be liable to the subject for actual damages, including damages for economic, bodily, or psychological harm which is a proximate result of the act.

(e) Each disclosure made in violation of this chapter is a separate and actionable offense.

Id.

91. CAL. HEALTH & SAFETY CODE § 199.96 (West Supp. 1992) (defendants charged with various sexual offenses subject to compulsory AIDS testing at the written request of the victim if the court finds that probable cause exists to believe that a possible transfer of bodily fluids occurred); CAL. PENAL CODE § 1202.1 (West Supp. 1992) (mandatory AIDS testing of defendants convicted of various sexual crimes); CAL. HEALTH & SAFETY CODE § 199.97 (West Supp. 1992) (persons charged with interfering with the duties of a peace officer, fire fighter, or emergency medical personnel by biting, scratching, spitting must submit to AIDS testing upon finding probable cause to believe there was a transfer of bodily fluids).

92. CAL. PENAL CODE § 7500 (West Supp. 1992) (compulsory AIDS testing of prisoners in order to protect the health and safety of custodial and law enforcement personnel, other inmates, probation and parole officers and prison supervisory and medical personnel).

93. CAL. PENAL CODE § 1202.6 (West Supp. 1992) (mandatory AIDS tests for persons convicted of soliciting and act of prostitution).

94. *Love v. Superior Court*, 226 Cal. App. 3d at 736, 740 (1990).

tests mandated by § 1202.6 constitute a search, the court noted that it is undisputed that “compulsory blood tests are searches subject to the Fourth Amendment, not only because physical penetration for the removal of bodily fluid, but because of the subsequent chemical testing leading to the revelation of private medical information.”⁹⁵

The court next made a cursory inquiry into whether the AIDS tests involved a criminal or administrative search.⁹⁶ The Petitioners contended that the statute involved a criminal search because the tests were conducted with the intent to obtain evidence to be used in criminal proceedings for future prostitution convictions.⁹⁷ Relying on the educational provisions⁹⁸ of the statute, the court rejected this argument stating that a reading of the section without taking into account the educational provision was not a fair interpretation of the legislative intent.⁹⁹

The court instead concluded that based on “[t]he provisions of the act, the legislative history of the act and recent findings of the Legislature,”¹⁰⁰ the legislative intent of the statute was controlling the spread of AIDS.¹⁰¹ While the court concluded that the statute serves an obvious and compelling governmental “special need”, it declined to state that this constituted an administrative rather than a criminal search.

The court applied the “special needs” balancing test by comparing the extent of the privacy invasion with the extent of the government interest.¹⁰² In its examination of the privacy intrusion, the court considered the intrusion of a blood test and the intrusion of a chemical analysis of the blood.¹⁰³

95. *Id.* (citing *Johnetta J. v. Municipal Court*, 218 Cal. App.1255, 1272-73, 267 Cal. Rptr. 666, 675 (1990)). See *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 616 (1989). “[P]hysical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee’s privacy interests.” *Id.* See also *Schmerber v. California*, 384 U.S. 757, 767-68 (1966).

96. *Love*, 226 Cal. App. 3d at 742.

97. *Id.* at 743. Petitioners suggested that the search was merely a search for evidence to be used in the future.

98. CAL PENAL CODE § 1202.6(d). See *supra* note 9.

99. *Love*, 226 Cal. App. 3d at 743. “This argument, however, by focusing on the testing requirement, does not constitute a fair reading of the statute because the argument ignores the significant educational provisions of the section.” *Id.*

100. *Id.* at 742.

101. *Id.* at 742-43.

102. *Id.* at 744.

103. *Id.* at 744-46.

Relying on a line of Supreme Court cases addressing the issue of compulsory blood tests,¹⁰⁴ the court found that the physical aspects of drawing blood involve only a minimal privacy intrusion.¹⁰⁵ In response to the Petitioners' argument that the chemical testing of their blood would constitute a substantial privacy intrusion,¹⁰⁶ the court acknowledged that § 1202.6 failed to provide for the confidentiality of the test results by the district attorney.¹⁰⁷ The court then accepted the People's interpretation of the statute that restricted the district attorney's use of the test results to purposes consistent with the legislative intent of the statute.¹⁰⁸

Having thus concluded that both the physical and chemical aspects of the testing scheme constitute only minimal privacy intrusions, the court considered the extent of the governmental interest in preventing the spread of AIDS.¹⁰⁹ Deferring to the Legislature regarding public health and safety justifications for AIDS testing of convicted prostitutes, the court held that the statute served a compelling governmental "special need" and that this need outweighed the privacy interests of prostitutes.¹¹⁰

104. *Schmerber v. California*, 384 U.S. 757, 771 (1966). The Supreme Court held that a blood test is not significant since "blood tests are common place in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma or pain." *Id.* See also *Skinner*, 489 U.S. at 625; *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (blood alcohol tests are safe, painless and commonplace); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (blood tests are routine in our every day life).

105. *Love*, 226 Cal. App. 3d at 744.

106. *Id.* at 746. The Petitioners contended that the statute involved a substantial privacy intrusion because the chemical testing would reveal private medical data since the statute failed to provide for confidentiality. *Id.*

107. *Id.*

108. *Id.* at 744-46. The court noted that the aim of § 1202.6 is in part to deter prostitution by persons known to be infected with the AIDS virus by providing for penalty enhancement for subsequent convictions and that the prosecutor must have access to the results of the tests to enforce the penalty provisions of § 1202.6. *Id.* at 745. Stating that "[t]he statutory scheme envisions no other reason for the prosecutor to obtain or use such information," the court rejected the proposal that the district attorney could use the test results for purposes unrelated to the statute. *Id.* at 746.

109. *Id.*

110. *Id.* at 740. The court noted that the legislature is vested with a large discretion in determining what is a communicable disease and in adopting measures to prevent the spread of communicable diseases. *Id.* Deferring to the Legislature's authority, the court concluded that "the testing of persons convicted of violating section 647, subsection (b), and the penalty enhancement . . . are means to deter acts known to spread the disease," thus serving an "obvious and compelling 'special need'." *Id.* at 743.

Once the court concluded that the testing regime constituted a reasonable search under the Fourth Amendment,¹¹¹ it concluded its analysis with a brief consideration of the Petitioners' due process¹¹² and equal protection arguments.¹¹³

IV. CRITIQUE:

The Supreme Court of the United States has developed a three part test to be used when a court must determine whether the "special needs" doctrine will allow a governmental search without the Fourth Amendment's warrant and probable cause requirements.¹¹⁴ The test evolved as a means to protect individual privacy interests under the Fourth Amendment in the absence of the traditional privacy safeguards.

The *Love* court's application of the "special needs" test was inadequate. By disregarding both constitutional and judicial standards designed to protect Fourth Amendment rights, the *Love* opinion threatens to deteriorate our right to be free from unreasonable searches and seizures.

111. *Love*, 226 Cal. App. 3d at 746.

112. *Id.* at 746-47. The Petitioners argued that the statute violates the due process clause of the Constitution because there is no reasonable relation between the statutes means and ends since there may be no transfer of bodily fluids in the commission of an act that violates § 647(b). *Id.* at 746. The court rejected this argument stating that whether there is a transfer of bodily fluids is largely irrelevant and that what is relevant is whether the group being tested are members of an AIDS high-risk group and to what extent that group threatens to transmit the virus to the general population. *Id.* at 747. The court then concluded that the Petitioners were members of a high-risk group since they had been convicted of a violation of § 647(b) from which the court concluded that it can be inferred that the Petitioners are sexually involved with multiple partners. *Id.*

113. *Id.* at 747. The Petitioners' final argument was that § 1202.6 denies them equal protection because the statute contains no confidentiality requirement while § 1202.1 does and involves a far more serious offense. *Id.* at 747. The court rejected this argument on the same grounds that it rejected the Petitioners argument that the statute failed to provide for confidentiality. *Id.* See *supra* notes 106-108 and accompanying text.

114. See, e.g., *Skinner v. Railway Executive's Ass'n*, 489 U.S. 602; *Treasury Employees' v. Von Raab*, 489 U.S. 656; *Burger v. New York*, 482 U.S. 691. See also *supra* notes 47-52 and the accompanying text for a discussion of the "special needs" test and its application by the Supreme Court. The "special needs" test requires: (1) a finding of an administrative search (as opposed to a criminal search); (2) a balancing test in which a diminished privacy expectation is outweighed by a heightened governmental interest; and (3) fulfillment of the three criteria established in *Burger*. The three criteria delineated in *Burger* are: (1) a substantial government interest must justify the regulatory scheme; (2) a warrantless search must be necessary to further the regulatory scheme; and (3) the regulatory scheme must serve as adequate substitute for a search warrant. 482 U.S. 691, 698-99.

A. PART ONE: ADMINISTRATIVE SEARCH:

The “special needs” doctrine provides an exception to the traditional Fourth Amendment privacy safeguards only when the government’s purpose in conducting the search is administrative.¹¹⁵ The *Love* court concluded that the state’s purpose behind § 1202.6 is controlling the spread of AIDS.¹¹⁶ The court’s conclusion was based on the educational provision of the act¹¹⁷ and recent findings by the California Legislature.¹¹⁸ In addition, the court found, based on a United States Department of Public Health Service’s [hereinafter USPHS] AIDS publication,¹¹⁹ that the compulsory testing provision serves the government’s purpose.¹²⁰ However, the court misconstrued the act, the legislative findings and the federal publication. First, in relying on the educational provision, the court disregarded the fact that the act does not require AIDS education for all persons subject to the compulsory testing under the act.¹²¹ Second,

115. See *supra* notes 30-36 and accompanying text for a discussion of the distinction between an administrative and a criminal search. A government purpose is administrative when the government is conducting the search to obtain information to be used either to ensure compliance with government regulation or to protect public health and safety rather than for criminal prosecution. *Id.*

116. See *supra* notes 100-101 and the accompanying text.

117. *Love*, 226 Cal. App. 3d at 743. The court rejected the Petitioners’ argument that the testing requirement constituted a criminal search because it was used to gather evidence for subsequent criminal prosecutions by relying on the education provision of the act. *Id.* The court stated that “this argument, however, by focusing on the testing requirement, does not constitute a fair reading of the statute because the argument ignores the significant educational provisions of the section.” *Id.* See also *supra* notes 97-99 and accompanying text for a discussion of the court’s treatment of this issue.

118. *Love*, 226 Cal. App. 3d at 742. The court refers to three findings by the California Legislature in the CALIFORNIA HEALTH AND SAFETY CODE: (1) § 199.45(a) stating that AIDS poses an unprecedented health crisis in California; (2) § 199.4(h) stating that sexual contact is the primary means of transmission; and (3) § 199.46(k) stating that prostitutes who pass the infection on to their clients are a specific group of concern. *Id.* Each of these legislative findings were passed under Chapter 1.14. 1986 Cal. Stat. ch. 1463, § 1 (enacting CAL. HEALTH AND SAFETY CODE §§ 199.45-199.51)

119. *Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity and Mortality* 509 (Aug. 14, 1987).

120. *Love*, 226 Cal. App. at 743. The court took judicial notice of guidelines for AIDS prevention published by the United States Public Health Services and concluded that the testing requirement has a preventative effect. *Id.* at 743 n.5.

121. See *supra* note 7. By relying on the educational provision of the act without acknowledging that the act fails to require AIDS education across the board, the court failed to consider whether the intent of the legislation was to prevent AIDS by two different means; education and deterrence. The education provision was designed to prevent AIDS by instructing prostitutes in the methods available to avoid contracting and/or spreading the virus. The testing provision was designed to prevent the spread of AIDS by creating an added deterrent for HIV positive prostitutes and sex offenders from engaging in the illegal activity that would lead to a subsequent conviction. When the provisions are examined separately, the testing provision is the equivalent of an criminal search since the AIDS tests are conducted to obtain evidence to be used in a criminal proceeding if there is a subsequent conviction.

the court failed to interpret the context of the legislative findings.¹²² Third, the court failed to interpret the rationale for the USDPHS's recommendation for testing by concluding that testing serves as a preventative measure without regarding the distinct roles of both testing and education.¹²³ Furthermore, the court failed to acknowledge the theory which allows the fruits of an administrative search to be used in a criminal prosecution so long as the primary purpose for the search is administrative.¹²⁴

A finding that the governmental action at issue is administrative is an essential component of the "special needs" test.¹²⁵ To ensure that the "special needs" exception is not

122. As specified in § 199.47(c) of Chapter 1.14, the intent was to "remove the impediments to the expeditious development of an AIDS vaccine." CAL. HEALTH AND SAFETY CODE § 199.47 (c) (West Supp. 1992). The court's reference to the finding that AIDS poses an unprecedented health crisis ignores the legislative finding that "the best hope of stemming the spread of the AIDS virus among the general public" is the development of an AIDS vaccine and not compulsory AIDS testing. CAL. HEALTH AND SAFETY CODE § 199.45 (a) & (b). The court's reference to the legislative finding identifying sexual contact as the main means of transmission ignores the Legislature's finding that the virus is also transmitted by "sharing hypodermic needles, contaminated blood transfusions, and during pregnancy to the fetus." CAL. HEALTH AND SAFETY CODE § 199.46 (h). The court's reference to the legislative finding identifying prostitutes who pass the virus on to their clients as a specific group of concern in spreading the virus to the heterosexual community disregards the fact that the Legislature identified "partners of high-risk groups (bisexual men and intravenous drug users) . . . [as] the main means of transmitting the AIDS virus to the heterosexual community." CAL. HEALTH AND SAFETY CODE § 199.46 (k) (emphasis added)

The court also disregarded other important findings by the California Legislature regarding AIDS such as the prohibition on compulsory AIDS testing and the extensive confidentiality provisions provided by the legislature. CAL. HEALTH AND SAFETY CODE § 199.22 (prohibition on AIDS testing without the subjects written consent); CAL. HEALTH AND SAFETY CODE § 199.21 (penalties for unauthorized disclosure of test results). See also *supra* notes 89-90 and accompanying text.

123. *Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 Morbidity and Mortality 509 (Aug. 14, 1987). This publication states that the primary "purposes of counseling and testing are to help uninfected individuals initiate and sustain behavior changes that reduce their risk of becoming infected and to assist infected individuals in avoiding infecting others." *Id.* However, since the recommendations for reducing ones risk of infection are identical to the recommendations for avoiding the infection of others, it appears that the testing serves merely to make individuals aware of their HIV status "maximizing the benefits of early intervention." *Love*, 226 Cal. App. 3d at 743 n.6 (quoting CAL. HEALTH AND SAFETY CODE § 144 (West Supp. 1990)).

124. See *supra* note 60 and accompanying text for a discussion of this theory. The Supreme Court has made it clear that the application of the "special needs" doctrine is not effected if the administrative search ultimately leads to evidence to be used in a criminal prosecution so long as the primary purpose of the search was administrative. Because the court had found that the primary purpose behind the statute is controlling the spread of AIDS, the court could have used the primary/secondary theory to dismiss the Petitioners' argument that the section involved a criminal search.

125. See, e.g., *supra* notes 34-36.

extended beyond its narrow limits, this portion of the “special needs” tests requires a more thorough analysis than that conducted by the *Love* court.¹²⁶

B. PART TWO: BALANCING:

The “special needs” doctrine provides an exception to the warrant and probable cause requirements of the Fourth Amendment only when an individual’s reduced expectation of privacy is outweighed by a heightened governmental interest.¹²⁷ This portion of the “special needs” test requires a court to identify the privacy and government interests at issue and evaluate the search in light of those interests.¹²⁸

The court concluded that the privacy intrusion caused by the compulsory testing provision of § 1202.6 is minimal.¹²⁹ However, the court reached this conclusion without making the preliminary inquiry into whether the Petitioners’ expectation of privacy was reduced.¹³⁰ This determination is especially crucial in an area in which, due to the nature of the AIDS virus and the stigma attached to it, the privacy intrusion may be heightened.¹³¹ In addition, the court was forced to hold that the

126. *Love*, 226 Cal. App. 3d at 743. The court merely concluded that the purpose of the statute was AIDS prevention without finding that the testing scheme constitutes an administrative search. *Id.*

127. *New York v. Burger*, 482 U.S. 691, 698-99. To justify a departure from the Constitution’s warrant and probable cause requirements there must be both a reduced expectation of privacy and a heightened governmental interest causing the balance to be struck in favor of the government. *Id.* See also *supra* note 48 and accompanying text.

128. See, e.g., *supra* note 47.

129. *Love*, 226 Cal. App. at 746. See *supra* note 104 and accompanying text.

130. See, e.g., *supra* notes 102-108 and accompanying text.

131. The devastating effects of receiving a positive AIDS test result has been the subject of both legal and medical commentary. The bulk of this commentary suggests that an individual has a heightened expectation of privacy in this area. See, e.g., *Johnetta J. v. Municipal Court*, 218 Cal. App. 3d 1255, 1278, 267 Cal. Rptr. 666 (1990). Faced with the constitutionality of mandatory AIDS testing under CAL. HEALTH AND SAFETY CODE § 199.97, the California court of appeal acknowledged that the psychological impact of receiving a positive test result is significant. *Id.* (citing *Doe v. Roe*, 139 Misc. 2d 1072, 526 N.Y.S. 718, 722 (1988)). In *Doe v. Roe*, the New York court denied a motion for an involuntary AIDS test in civil litigation. *Doe*, 139 Misc. 2d at 1072. The court’s decision was based, in part on the psychosocial ramifications of mandatory testing stating that “potential ostracism and psychic harm which may occur from mandatory testing have resulted in most experts and organizations including the Surgeon General of the United States, the United States Public Health Services, The American Medical Association, and most state and local health departments . . . opposing mandatory nonvoluntary testing.” *Id.* at 721. The State of California has also demonstrated concern for the psychosocial impact of nonvoluntary testing. CAL. HEALTH AND SAFETY CODE §§ 199.21 and 199.22. These sections prohibit involuntary testing except in very limited circumstances and provide for the confidentiality of test results with civil and criminal penalties set for unauthorized disclosure.

confidentiality provision of California Penal Code § 1202.1 applies with equal force to § 1202.6 in order to conclude that the chemical analysis involves a minimal intrusion.¹³²

Furthermore, the court's inquiry into the government's interest was cursory.¹³³ Exhibiting great deference to the state, the court concluded that controlling the spread of AIDS is a compelling governmental interest and that the testing provision furthers that interest.¹³⁴

The court's failure to give adequate consideration to either the privacy or government interests precludes an honest assessment of the balance between the two factors.

C. PART THREE: BURGER CRITERIA:

The "special needs" doctrine furnishes an exception to the Fourth Amendment's warrant and probable cause requirements only if the three criteria delineated in *Burger* are fulfilled.¹³⁵ However, the *Love* court's analysis failed to address this portion of the "special needs" test.

The court's failure to examine whether the Petitioners have a heightened expectation of privacy precludes an honest assessment of the privacy intrusion caused by the testing and therefore prevents a valid balancing of privacy and government interests under the "special needs" doctrine.

132. *Love*, 226 Cal. App. 3d at 747. Section 1202.1 provides that the test results "shall be available to the prosecuting attorney upon request for the sole purpose of preparing counts for a subsequent offense under Section 647(f) or sentence enhancement under Section 1202.85." CAL. PENAL CODE § 1202.1 (c) (emphasis added). Section 1202.6 provides that the test results shall be furnished to the district attorney upon request. CAL. PENAL CODE § 1202.6 (g). However, this section does not contain the restriction on the district attorney's use found in § 1202.1 (c). The court found that the language of the statute could be construed to restrict dissemination by the district attorney. Noting that "[s]tatutes are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional." *Love*, 226 Cal. App. at 745 (citing *People v. Amor*, 12 Cal. 3d 20, 30, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974)) (brackets in original).

133. *Love*, 226 Cal. App. 3d at 740. The court identified the government's interest as AIDS prevention and stated that the control of a communicable disease is a valid exercise of the state's police power. *Id.*

134. *Love*, 226 Cal. App. 3d at 740. The *Love* court noted that:

[t]he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof.

Id. (quoting *In re Johnson*, 40 Cal. App. 242, 244, 180 P. 644). Considering the substantial controversy surrounding the AIDS epidemic and mandatory testing, the court's blind deference to the legislature seems unreasonable in this area.

135. See *supra* notes 56-59 and accompanying for a discussion of the three criteria.

Since a finding on these requirements was disregarded, it is uncertain whether the court would have found these criteria satisfied.¹³⁶ While it is probable that the court would have found that the statutory scheme provides an adequate substitute for a search warrant,¹³⁷ the question remains whether the requirement of a warrant would frustrate the government interest making a warrantless search necessary.¹³⁸ In light of the limited number of situations in which the Supreme Court has found that a warrant would frustrate the government interest,¹³⁹ it

136. The *Love* court did, however, find that the government has a compelling interest in preventing AIDS. *Love*, 226 Cal. App. 3d at 743.

137. The third prong of the *Burger* test requires that the testing program provides a constitutionally adequate substitute for a search warrant. *New York v. Burger*, 482 U.S. at 691, 699. The Court held that the inspection scheme provided for an adequate substitute for a search warrant because it: (1) informed persons subject to the inspections of the possibility of regular inspections; (2) limited the time, place and scope of the inspections; and (3) limited the discretion of the inspection officers. *Id.* at 703. The testing requirement in CAL. PENAL CODE § 1202.6 also provides for an adequate substitute by: (1) informing prostitutes of the prospect of being subject to mandatory AIDS testing upon a conviction of § 647 (b); (2) limiting the time, place and scope of the tests; and (3) restricting the discretion of the persons conducting the tests. *Id.*

138. The second prong of the *Burger* test requires that a warrantless search must be necessary to further the government's interest. *Burger*, 482 U.S. at 699.

139. The Supreme Court has routinely held that warrantless searches are necessary if the requirement of obtaining a warrant would frustrate the governmental interest. *See, e.g., Burger*, 482 U.S. at 702; *Skinner v. Railway Executive's Ass'n*, 489 U.S. 602, 629-30. The Court held in *Skinner* that the requirement of a warrant would frustrate the government interest in ensuring railroad safety. *Id.* at 624. Because of the rate at which drugs and alcohol are eliminated from the bloodstream, the Court held that the delay caused by obtaining a warrant could result in the loss of evidence thus frustrating the government's interest. *Id.* In *Burger*, the Court held that imposing the warrant requirement would frustrate the government's interest by possibly alerting owners and operators thus frustrating the deterrent effect of "frequent and unannounced" inspections. *Burger*, 482 U.S. at 703.

The Supreme Court has found other circumstances that make a warrantless search necessary because of the hindrance of the government's interest. First, the Supreme Court has found that the need for "swift and informal disciplinary procedures" may serve to justify a warrantless search. *New Jersey v. T.L.O.*, 469 U.S. 325, 340. Second, the Court has found that unfamiliarity with the procedures for obtaining a warrant may serve as a justification for a warrantless search. *See T.L.O.*, 469 U.S. at 339-40 (school officials); *O'Connor v. Ortega*, 480 U.S. 709, 722 (hospital administrators); *Skinner*, 489 U.S. at 623 (railroad supervisors). The Court in *Skinner*, found that railroad supervisors "have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence. 'Imposing unwieldy warrant procedures . . . upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.'" *Id.* at 623-24 (quoting *Ortega*, 480 U.S. at 722). Third, the Court found that if a warrant would jeopardize an effective deterrent to prohibited conduct a warrantless search may be justified. *Skinner*, 489 U.S. at 630. *See also supra* notes 69-70 and accompanying text. Fourth, the Court has found that if a warrant would divert resources while providing little additional protections, a warrantless search may be justified. *Treasury Employees' v. Von Raab*, 489 U.S. 656, 666-67 (1989). *See also supra* note 81 and accompanying text.

is improbable that the court would have found this requirement fulfilled.¹⁴⁰

By failing to address the three *Burger* criteria in the present context, the court did not apply a complete "special needs" analysis and, therefore, failed to ensure that the Fourth Amendment is not violated in the non-criminal context.

V. CONCLUSION

The AIDS epidemic poses a formidable health crisis in California. The virus has killed thousands and has been the occasion of hysteria, discrimination and stigmatization. The urgency in combatting the virus has by this time become apparent to all. However, the issue in *Love v. Superior Court* is not whether there is a need for governmental action. Rather, the issue is whether the action taken by the state of California comports with the Fourth Amendment of the United States Constitution.

By allowing the government to compel prostitutes to submit to AIDS testing, the *Love* court has permitted our constitutional rights to fall prey to societal hysteria. The extreme urgency generated by the need to combat the disease calls for careful constitutional consideration of all laws passed under the guise of dealing with the AIDS crisis. Justice Marshall, in a dissenting opinion in *Skinner v. Railway Executive's Ass'n*, cautioned that:

140. In the *Love* context it is apparent that the warrant requirement would not frustrate the government's interest as it may have in *Skinner* and *Burger*. See *supra* note 139. The evidence of the AIDS virus in the bloodstream is not eliminated over time and the delay in obtaining a warrant would not result in the loss of evidence. Neither would the possibility of alerting the convicted prostitutes of the impending test frustrate the government interest. By the time the testing is ordered, the prostitutes have been charged and convicted and doubtlessly know of the impending test. Any possible deterrent effect of the statute would not be frustrated by the possibility that a warrant may alert prostitutes of an impending test.

In addition, requiring a warrant in the *Love* situation does not create the problems that the Supreme Court found make a warrant impracticable. See *supra* note 139. The need for swift and informal disciplinary procedures is not present when convicting prostitutes and testing them for AIDS. Unfamiliarity with the warrant procedure is not a problem because the statute orders the court to direct the testing. Resources would not be diverted because the tests are directed as part of court proceedings and additional costs would be minimal.

The only possible circumstance that is applicable to the present context is the possibility that the general deterrent effect of the statute would be jeopardized by requiring the state to obtain a warrant before testing prostitutes for AIDS. However, this circumstance is applicable only to prostitutes who have tested positive under the statute, and then only if the state would not be able to obtain a warrant and if the penalty enhancement provision is likely to cause these prostitutes to forego work.

[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases. *Hirabayashi v. United States*, *Korematsu v. United States* and the Red Scare and the McCarthy-Era internal subversion cases, *Schenck v. United States*, *Dennis v. United States* are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.¹⁴¹

Since the addition of the Fourth Amendment to the United States Constitution, the Supreme Court has carved out several exceptions to the Amendment's privacy safeguards, but none so broad as the developing "special needs" doctrine. Since its inception, the diversity of the "special needs" application has increased dramatically, from searches of the premises of highly regulated business, to searches of the home, and ultimately to searches of the human body. The "special needs" test attempts to restrict the application of the exception by ensuring that it does not overreach its parameters. While the Supreme Court regards it as an adequate substitute for the Fourth Amendment's traditional privacy safeguards, it provides little protection for our Fourth Amendment rights.

Rather than applying the limited protection afforded by the "special needs" test, the *Love* court disregarded both judicial and constitutional safeguards. In light of the *Love* court's analysis it is difficult to imagine a situation, short of blanket testing, which would not withstand the courts scrutiny. The complex social realities of the AIDS epidemic demand greater vigilance against such drastic measures as mandatory testing.

141. *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 635 (1989).